

# *Bulletin*

**TO:** All Justices, Registers, First Assistant Registers and Chief Probation Officers

**FROM:** Sean M. Dunphy, Chief Justice

**DATE:** October 15, 1998

**RE:** **Justices' Bulletin # 98-25** Legislation  
**Registers' Bulletin # 98-29**  
**First Assistant Registers' Bulletin # 98-13**  
**Chief Probation Officers' Bulletin # 98-16**

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## CHAPTER 179 AN ACT RELATIVE TO THE CONSIDERATION OF DOMESTIC VIOLENCE IN CUSTODY AND VISITATION PROCEEDINGS

This new statute amends Chapters 208 §31, 209A § 17 and adds Chapters 208 §31A, 209 §38 by requiring that in the issuance of any temporary or permanent custody order the Justice hearing the matter shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interests of the child. "Abuse" under these new sections is defined as one or more acts between a parent and the other parent or between a parent and child in attempting to cause or causing bodily injury, placing another in fear of imminent serious bodily injury or causing another to engage in involuntary sexual relations by force threat or duress.

Bodily injury or serious bodily injury has the same definition in this Act as is provided in Chapter 265 §13K which states: " a) bodily injury is that which causes substantial impairment of the physical condition, including, but not limited to, any burn, fracture or any bone, subdural hematoma, injury to any internal organ, or any injury which occurs as the result of repeated harm to any bodily function or organ, including human skin; b) serious bodily injury is bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, or substantial risk of death."

In Commonwealth v. Gordon, 407 Mass. 340, 553 N.E. 2d (1990), the Supreme Judicial Court found that the abuse required to be put "in fear of imminent serious physical harm" under Chapter 209A is also consonant with the common law definition of assault, an act placing another

in reasonable apprehension that force may be used. In Commonwealth v. Matsos, 421 Mass.391, 394-395, (1995) the SJC citing Gordon held that placing a victim “in fear of bodily injury” approximates the common law definition of the crime of assault and the court should look to the words and actions of the defendant in light of the attendant circumstances to determine if the apprehension is reasonable.

A Justice’s finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred creates a rebuttable presumption that it is not in the best interests of the child to be placed in the sole custody, shared legal custody or shared physical custody with the abusive parent. “Abusive parent” is defined as a parent who has committed a pattern of abuse or a serious incident of abuse.

The issuance of an order or orders under Chapter 209A shall not, in and of itself constitute a pattern or serious incident of abuse, nor shall such orders entered *ex parte* be admissible to show a serious incident or pattern of abuse. The orders are admissible, for such other purposes as the court may determine, other than showing a serious incident of abuse or pattern of abuse. The statute appears to contemplate the introduction of the supporting affidavit from the Complaint for Protection from Abuse as to the underlying facts, which led to the issuance of the Chapter 209A order, to be used to form a basis for a finding that a serious incident of abuse or a pattern of abuse has occurred.

The Court is required to enter, should it find a serious incident of abuse or pattern of abuse has occurred and it makes an award of temporary or permanent custody to either party, written findings within ninety(90) days of the order which demonstrate that such order is in furtherance of the child’s best interests and provides for the safety and well-being of the child. These findings must be done in all such cases, irrespective of whether an appeal has been filed.

If the Court enters an order for visitation to the abusive parent, the Court must take measures to provide for the safety and well-being of the child and the safety of the abused parent. The Court may consider conditions for supervised visitation, including ordering the abusive parent to pay for the costs of the supervised visitation, ordering pick-up and drop-off at a neutral site in a protected setting in the presence of a neutral third party, ordering the abusive parent to attend a certified batterer’s program, or ordering the abusive parent to abstain from consumption of alcohol or controlled substances twenty-four (24) hours preceding and during visitation. Overnight visitations may be prohibited.

The Probate and Family Court Committee on Supervised Visitation is currently working to complete standards for supervised visitation. Judges and probation officers may find the Probate and Family Court Domestic Violence Visitation Risk Assessment helpful when considering visitation matters. Therefore, I have enclosed a copy for their reference.

The Court may require the abusive parent to post a bond, order an investigation in the matter, appoint a guardian *ad litem* or attorney for the child. No funds have been appropriated to

compensate counsel to represent children and based upon past history, it is unlikely that the Committee for Public Counsel Services will agree to pay counsel since the appointment is discretionary.

The Court may also impose any other conditions which it deems necessary to protect the safety and welfare of the child or the abused parent.

This Act was signed by the Acting Governor on July 22, 1998 and takes effect on **October 21, 1998**.

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CHAPTER 194, ACTS OF 1998, SECTION 199 - Amendment of Chapter 201 §5:Guardianship of Minors.

The FY 1999 State Budget, Chapter 194 of the Acts of 1998, Section 199 contains an amendment to Chapter 201 §5 Guardianship of Minors by adding the following sentence: “The Court may revoke the appointment of a guardian if the party petitioning for revocation proves a substantial and material change in circumstances and such revocation is in the best interests of the child.” In our opinion, this section is effective immediately. We do not know how this provision will be interpreted by the appellate courts in view of the decisions in the cases of Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207 (1980) and Guardianship of Clyde, 44 Mass. App. Ct. 767, 694 N.E.2d 21(1998).

cc: Barbara A. Dortch-Okara, Chief Justice  
for Administration and Management

Enclosure